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ADMINISTRATION OF JUSTICE IN THE AGE OF HOMER¹

BY ROBERT J. BONNER

Laws in the sense in which the Xenophontic Pericles² defined them—*πάντες γὰρ οὗτοι νόμοι εἰσὶν οὓς τὸ πλῆθος συνελθὼν καὶ δοκιμάσαν ἔγραψε, φράζον ἃ τε δεῖ ποιεῖν καὶ ἃ μὴ*—are not found in Homer. But there were nevertheless definite ideas of *ἃ τε δεῖ ποιεῖν καὶ ἃ μὴ*, though they had not yet been formulated in codes and constitutions. And the notion of orderliness and of obedience to the prevailing standards of right and justice was expressed by such words as *εὐνομία*, *εὐηγεσίη*, and *εὐδικία*. The *θέμιστες* were the nearest approach to laws. Strictly speaking they were pronouncements of the king indicating in an authoritative fashion what was right and proper (*θέμις*) in a particular set of circumstances. The usual occasion was the arbitration of a dispute. To the Zeus-born and Zeus-nurtured king was granted the scepter and the *θέμιστες*.³ When the lesser chiefs as representatives of the ruling aristocracy dispensed justice they, too, were intrusted with the *θέμιστες* and held the scepter when they pronounced judgment.⁴ Originally the decisions were regarded as divine inspirations; but the use of the adjective *σκολιαί* in connection with *θέμιστες* shows that the notion of a divine source had practically disappeared.⁵ None of these inspired judgments are recorded in

¹Special phases of the legal history of Greece in the Homeric age, e.g., the meaning of *θέμιστες*, the trial scene pictured on the shield of Achilles, and the punishment of homicides, have always attracted a great deal of attention. Of the trial scene Leaf observes "there are probably no twelve consecutive lines in the Homeric poems which have been obscured by so many explanations" (*Journal of Hellenic Studies* VIII, 122 ff.). But no one, I believe, has collected all the data furnished by the poems for a first chapter of Greek legal history. The present paper is the result of an attempt to reconstruct the Homeric judicial system.

²Xen. *Memorab.* i. 2, 42.

³*λαῶν ἐσσι ἀναξ καὶ τοι Ζεὺς ἐγγυάλιζε || σκῆπτρόν τ' ἡδὲ θέμιστας, ἵνα σφίσι βουλεύσθω.*—*Il.* ix. 98-9.

⁴*Ibid.* i. 234 ff.

⁵*Ibid.* xvi. 387.

the poems, but the well-known judgment of Solomon will serve as an illustration.¹

The word *δίκη* came to share with *θέμις* the general idea of justice, and is used to supplement the Homeric legal vocabulary. Thus a person who refuses to do what is right is *ἀθεμίστιος*, but a righteous man is *δίκαιος*, not *θεμίστιος*. And the abstract idea of justice is expressed not by *θεμιστοσύνη* but by *δίκη*. *Θεμιστεύω* in the sense of "pronounce judgment" occurs, but *δικάζω* is the more common word. *Κρίνω* is also used of the exercise of judicial functions in such phrases as *κρίνωσι θέμιστας*.

In modern criminal law self-help² in the form of self-defense against aggression plays an important rôle subject to certain restrictions. But in the Homeric age there were no restrictions upon the exercise of self-help save such as were imposed by the individual's own weakness. The general custom of carrying arms greatly facilitated recourse to this method of obtaining redress.

¹ I Kings 3:16 ff. Cf. Gilbert *Beiträge zur Entwicklungsgeschichte des griechischen Gerichtsverfahrens* 463. Hirzel (*Dike, Themis, und Verwandtes* 40) regards *θέμις* as "die Erklärung eines göttlichen Willens, des Willens des Zeus." "Aber," he continues, "das Gebiet der *θέμις* reicht noch weiter. Ueberall wo ein Allgemeines herrscht, als Natur (*Il.* ix. 133 ff.), als Gewohnheit (*Od.* xiv. 129 ff.), und Sitte (*Od.* xi. 450 f.), oder wo es auch nur als Regel des socialen und politischen Lebens einen leisen Zwang ausübt (*Od.* iii. 186 f.), empfand der Grieche einen höhern Willen, eine *θέμις*, ohne dass dieser Wille gerade ein vernünftiger, geschweige denn ein göttlicher zu sein brauchte." Maine (*Ancient Law* 4 f.) has pointed out that these judgments are not based on custom but themselves contain the germs or rudiments of customs. *Δίκη* means "way," "habit," or "custom" (*Od.* xviii. 215), "what is right or due" (*Od.* ix. 215; *Il.* xix. 180), "justice" (*Od.* xiv. 84; *Il.* xvi. 388), and "a judgment" (*Od.* iii. 244; *Il.* xvi. 541). Finsler ("Das Homerische Königtum," *Neue Jahrbücher* XVII, 329) denies that *δίκη* ever means a "judgment"; cf. Maine *op. cit.* 5, and Hirzel *op. cit.* 57. Hirzel's view that "way" or "custom" is a derived rather than the original meaning of *δίκη* is not convincing.

² Anyone may resist attacks upon himself or his property. But the law requires that the resistance shall not be more than is sufficient for the purposes of self-defense; for the prevention of a wrong, not its redress, is the object of self-defense. But in the case of certain wrongs the common law allows true remedial self-help. One may expel a trespasser, retake goods of which he is the rightful owner, or abate a nuisance. So far as assisting another to defend himself is concerned, it is certain that a person may always defend those whose relation to him implies protection. It has even been held that a man may defend anyone; but his right to assist is no greater than the other's right to defend himself. In practice these rights are materially restricted by the prohibition against carrying weapons. I follow the example of Sir Frederick Pollock in using the English equivalent of the expressive German *Selbsthülfe*. The distinction between self-defense and self-help which he points out has no application here (*The Law of Torts* 154).

Relatives and friends were always expected to espouse the cause of the injured. Even wrongdoers could count on the assistance of their kinsmen. Odysseus in his character of Cretan refugee wondered why Telemachus was not aided in his troubles by his brothers: *οἱσί περ ἀνὴρ μαρναμένοισι πέποιθε, καὶ εἰ μέγα νείκος ὄρηται*.¹ And later, disguised as a beggar he said to the suitors, "Many an infatuate deed I did, giving place to mine own hardihood and strength, and trusting to my father and my brethren."²

Within his own household the master punished his servants even to the extent of inflicting death.³ And like the Cyclopes each man *θεμιστεύει παίδων ἢ δ' ἀλόχων*.⁴ It was the duty of the father to avenge the wrongs of those who were under his protection, including the servants.⁵

Of self-help in obtaining redress for the killing of relatives there are a number of instances. Thirteen homicides are mentioned apart from the slaying of the suitors and of the followers of Aegistheus and Agamemnon.⁶ The typical wanderer from his native country is the fleeing homicide;⁷ and the typical trial scene pictured on the shield of Achilles arises out of a homicide. There is no trace in the poems of the later conception that homicide involves the pollution both of the slayer and of those who associated with him. Eumaeus the swineherd comes close to this conception, so far as the slayer himself is concerned, when he refuses the wager of the disguised Odysseus involving his death at the hands of Eumaeus if his prophecy regarding the return of his master is not fulfilled:

ξῆν', οὐτῷ γάρ κέν μοι ἔκκλείη τ' ἀρετὴ τε
εἷη ἐπ' ἀνθρώπους ἅμα τ' αὐτίκα καὶ μετέπειτα,
ὅς σ' ἐπεὶ ἐς κλισίην ἄγαγον καὶ ξείνια δῶκα,
αὐτὶς δὲ κτεínaμι φίλον τ' ἀπὸ θυμὸν ἐλοίμην·
πρόφρων κεν δὴ ἔπειτα Δία Κρονίωνα λιτοίμην.⁸

¹ *Od.* xvi. 97 ff.

² *Od.* xviii. 139 ff.

³ Odysseus punished with death the goatherd and the faithless maidservants.

⁴ *Od.* ix. 114 ff. Amyntor cursed his son and drove him into banishment for debauching his concubine (*Il.* ix. 447 ff.). Other instances of punishment inflicted are noticed in the general discussion of homicide.

⁵ One of Odysseus' charges against the suitors was that they had debauched his female servants.

⁶ *Od.* iv. 536.

⁷ *Il.* xxiv. 480. When Odysseus desires to conceal his identity and account for his wandering from Crete he pretends that he slew a man (*Od.* xiii. 259).

⁸ *Od.* xiv. 402 ff.

The suitors even propose to seek the counsel of the gods regarding the contemplated murder of Telemachus.¹ Outside of the circle of the dead man's kinsmen and friends² there is no indication of any popular sentiment against ordinary homicide. It would be hard to imagine a more cowardly murder than the fictitious slaying of the son of Idomeneus by Odysseus. And yet Eumaeus receives the self-confessed murderer, as he supposed, with all the respect due a stranger in accordance with the prevailing customs.³ There are a number of homicides mentioned who were living as honored members of communities to which they had come as exiles. The slaying of parents, however, met with universal condemnation. Phoenix, the aged companion of Achilles, tells of his feud with his father and of his design to slay him. But owing to his fear of "the people's voice and the many reproaches of men," who would call him parricide, he refrained.⁴ In later Greek story Orestes slew his mother Clytemnestra; but in Homer it is neither stated nor necessarily implied that he was responsible for her death. So the honor he won for avenging his father's murder does not imply public approval of matricide under any circumstances.⁵ And we may be sure that the wife who compassed the death of her husband would be roundly condemned. Menelaus has nothing to say of Clytemnestra's share in the plot against Agamemnon; Aegistheus is alone responsible for his death. Nestor, too, seems to lay the blame of her treachery to her husband upon Aegistheus and the *μοῖρα θεῶν*, though he does call her *στυγερή*.⁶ Agamemnon's spirit speaks bitterly of her, and says she has brought disgrace not only upon herself but upon her whole sex.⁷ As a rule men shrank from slaying a guest. Heracles' murder of Iphitus is aggravated by the fact that Iphitus was his guest.⁸ And the refusal of Eumaeus to accept Odysseus' wager which has already been quoted affords further evidence of this prevailing sentiment.⁹

¹ *Od.* xvi. 402.

² *Ibid.* iii. 310; iv. 535.

³ *Ibid.* xiii. 259 ff.

⁴ *Il.* ix. 459 ff.; cf. Buchholz *Homerische Realien* II, 83.

⁵ *Od.* i. 298.

⁶ *Ibid.* iii. 269 ff., 310.

⁷ *Ibid.* xi. 429 ff.

⁸ *Ibid.* xxi. 27 ff.: *ὅς μιν ξείνον ἔοντα κατέκτανεν ᾧ ἐνὶ οἴκῳ, || σχέτλιος, οὐδὲ θεῶν ἔπιν αἰδέσασα' οὐδὲ τράπεζαν || τῇν ἣν οἱ παρέθηκεν.*

⁹ *Ibid.* xiv. 402 ff.

The idea that murder is a menace to society is modern; in Homer it is regarded as the concern of the relatives alone and such partisans as they can assemble. Public sentiment not only tolerated blood-feuds, but even demanded that men should avenge the death of their kinsmen. Shame and disgrace were the portion of him who failed to take vengeance on the slayer of brother or son, while honor and glory awaited him who performed this duty.¹ And fortunate were they who left behind them near kinsmen to punish their slayers.² Some scholars, influenced by the later Athenian practice of confining the institution of legal proceedings against a slayer within certain limits of relationship, have sought for traces of a similar practice in Homer. Leist³ attempts to show that the blood-feud did not extend beyond cousins; other kinsmen and relatives by marriage participated only as assistants. To make his point he is obliged to translate *ἔται* by "cousins" in one passage, and "brothers" in another. Naturally the nearest relatives took the leadership if they were in a position to do so.⁴ There is no doubt that if Menelaus had returned home earlier he would not have waited for Orestes to avenge Agamemnon.⁵ But in the absence of near relatives distant kinsmen and even friends would readily take up the blood-feud.⁶ The question as to the right to exact vengeance could arise in practice only in cases where an agreement to accept blood-money was reached. Such an agreement could satisfactorily be made only with someone who could give a reasonable guarantee that the slayer would not be molested. In the only specific instance of an agreement to accept a blood-price the relationship is not mentioned.⁷

¹ Od. xxiv. 433: *λώβῃ γὰρ τὰδε γ' ἐστὶ καὶ ἐσσομένοισι πυθέσθαι, || εἰ δὲ μὴ παίδων τε κασιγνήτων τε φονῆας || τισόμεθ'.* Cf. Orestes Od. i. 298.

² Od. iii. 196: *ὡς ἀγαθὸν καὶ παῖδα καταφθιμένοιο λιπέσθαι || ἀνδρός.* Cf. Il. xiv. 485.

³ Leist *Gräco-italische Rechtsgeschichte* 42; *κασίγνητοί τε ἔται τε* Od. xv. 273: *ἔται καὶ ἀνέψωι* (Il. ix. 464).

⁴ Lipsius *Attisches Recht* 7: "Der Kreis der zur Blutrache verpflichten Verwandten erscheint nicht genau begrenzt; zunächst sind es natürlich Söhne, Brüder, Väter, aber auch Vettern und wenigstens an einer Stelle auch die entfernten Verwandten." Among the more distant relatives may be mentioned grandnephews and great-grandnephews (Il. ii. 665).

⁵ Od. iv. 546 ff.: *ἥ γὰρ μιν ζῶν γε κιχήσεται, ἥ κεν 'Ορέστης || κτεῖνεν ὑποφθάμενος.* Cf. Od. iii. 309.

⁶ Od. xxiii. 119. Cf. Achilles and Patroclus.

⁷ Il. xviii. 498.

Homicide amongst relatives was commonly settled by banishment; and the exile seems to have been in no danger if he afterward met a kinsman of himself and his victim. There must have been a number of such possibilities on the expedition against Troy. Medon, the illegitimate son of Oileus, who slew his step-mother's brother, must have met his half-brother Ajax, the nephew of his victim.¹ But sometimes a family feud arose and the life of the slayer was in danger. Thus Tleptolemus, who slew his great-uncle, fled with a large number of followers owing to the threats of his relatives: ἀπέιλησαν γάρ οἱ ἄλλοι || υἱέες υἱανοὶ τε βίης Ἑρακλήεης.² Althea is said to have called down curses on her son Meleager, who had slain her brother; but in spite of her desire for his death he was neither slain nor banished.³

In the case of homicides outside of the family the first instinct of the slayer was to flee. The more important the victim the more serious was the predicament of the slayer: δεινὸν δὲ γένος βασιλῆϊόν ἐστι κτείνειν. Even if the slain man was a humble person with few to avenge him the only safety was in flight.⁴ The fate of the various homicides mentioned in the poems seems to indicate pretty clearly that voluntary banishment was the usual issue.⁵ Eight of the thirteen went into exile. These figures are, of course, not entirely conclusive, because there is but little occasion for mentioning those who fell victims to the vengeance of the enraged kinsmen, or those who paid the blood-price. When men of rank were concerned in a homicide the resulting feud might involve so many as to amount to civil war. Tleptolemus, to avoid a disastrous feud, gathered his faction together and founded a settlement in Crete.⁶ Civil war would have been the result of the feud between Odysseus and the relatives of the suitors had they not become reconciled. When once the fugitive got away he did

¹ *Il.* xv. 332 ff.

² *Ibid.* ii. 665.

³ *Ibid.* ix. 565.

⁴ *Od.* xvi. 401; xxiii. 118 ff.

⁵ I include in this list Odysseus in his character of Cretan exile (*Od.* xiii. 259). The others are as follows: Medon, *Il.* xiii. 696; xv. 332; Lykophron, *ibid.* xv. 431; Epigeus, *ibid.* xvi. 573; Patroclus, *ibid.* xxiii. 85 ff.; an unnamed Aetolian, *Od.* xiv. 378; Theoclymenus, *ibid.* xv. 271; Tleptolemus, *Il.* ii. 655 ff.; all these were banished. Aegistheus was slain. The unnamed slayer in the trial scene paid blood-money. Heracles (*Od.* xxi. 27), Meleager (*Il.* ix. 565) and Orestes were not molested.

⁶ *Il.* ii. 655.

not seem to be in any danger. Twice the fleeing slayer is called a suppliant. But what he asks for is not protection but shelter, or assistance in continuing his flight. There is no instance of any attempt to molest a fugitive in his place of banishment. Theoclymenus, it is true, professed to fear pursuit, but apparently his fears were groundless.¹ The lot of the murderer banished for life must often have been hard, but this feature is never mentioned in Homer. The spirit of Patroclus speaks bitterly of his banishment though he found in Peleus a noble patron and in Achilles a loving comrade.² Aegistheus is the only murderer who suffered death. He had committed a dastardly murder, and Nestor suggests that if Menelaus had slain him he would have denied him funeral rites. But it is too much to infer that a slain murderer was ever in danger of being treated as Achilles proposed to treat Hector. Menelaus himself gives no hint of such an intention had he forestalled Orestes in slaying Agamemnon's murderer.³ Three homicides paid no penalty. Heracles slew a stranger whose death could have been avenged only by war.⁴ Meleager's distinguished services in saving his city from sack probably enabled him to defy the machinations of his incensed mother;⁵ the punishment of Orestes by avenging furies is unknown to Homer.⁶

The acceptance of blood-money seems to have been comparatively rare. Apart from the trial scene pictured on the shield of Achilles, which arose out of an agreement to settle a homicide for a blood-price, there is no specific case. A man who has settled with the slayer of a brother or a son for a large sum is cited in a simile of the *Iliad* (ix. 632-35) as the highest type of commendable, though perhaps unusual, self-restraint. We do not know what considerations induced relatives to accept blood-money. There is

¹ *Il.* xvi. 573; *Od.* xv. 271.

² *Il.* xxiii. 85 ff.

³ *Od.* iii. 256 ff.; iv. 547.

⁴ *Od.* xxi. 28; cf. *Il.* xvi. 58-59: τὴν ἀψ' ἐκ χειρῶν ἔλετο κρείων Ἀγαμέμνων || Ἀτρείδης ὡς εἰ τιν' ἀτίμητον μετανάστην for the position of a stranger.

⁵ *Il.* ix. 565 ff.

⁶ Murderers are spoken of in one passage as men seized by a grievous curse: ὡς δ' ὅτ' ἄν ἀνδρ' ἀτρη πυκινὴ λάβῃ, ὅς τ' ἐνὶ πάτρῃ || φῶτα κατακτείνας ἄλλων ἐξέλετο δῆμον (*Il.* xxiv. 480-81). The ἀτρη is best taken as that which caused the homicide. The notion of ἀτρη following a homicide seems to belong to a later period. But Homer does mention curses called down upon wrongdoers (*Il.* ix. 453 ff.; 565 ff.; *Od.* ii. 135).

no trace of a tendency to put pressure on relatives to induce them to forego the blood-feud. Neither is there any indication that the circumstances under which the homicide was committed were ever taken into account. The modern classification of homicide as justifiable and excusable was unknown. Neither was any distinction made between φόνος ἀκούσιος and φόνος ἐκούσιος. Patroclus committed the homicide for which he was banished, οὐκ ἐθέλων. This case shows further that not even extreme youth saved one from the penalties of manslaughter.¹

There is no clue to the origin of the practice of taking blood-money. It has been suggested that it was to defray the expenses of sacrifices to appease the spirit of the dead. There is a hint of this in Achilles' promise to share with the spirit of Patroclus the ransom he received for Hector's body.² Neither is there any trace of the modern idea of compensation measured by the damages suffered by surviving relatives.³

Adultery, seduction, or rape was punished by the husband or nearest relative in the case of a free woman, by the master in the case of a slave. Aegistheus' adultery with Clytemnestra is regarded as aggravating the murder of Agamemnon, and his death at the hands of Orestes is an expiation of the seduction as well as of the murder.⁴ The injured husband might slay the adulterer or he might, like Hephaestus in the lay of Demodocus, exact a fine.⁵ Anteia, the wife of Proetus, falsely accused Bellerophon of attempted rape and insisted that her husband should slay him.

¹ εὐτέ με τυτθὸν ἔοντα Μενότιος ἐξ' Ὀπείντος
ἤγαγεν ὑμέτερόνδ' ἀνδροκτασίης ὕπο λυγρῆς
ἡματι τῷ δτε παῖδα κατέκτανον Ἀμφιδάμαντος
νήπιος, οὐκ ἐθέλων, ἀμφ' ἀστραγάλοισι χολωθεῖς. (Il. xxiii. 85 ff.).

In a modern court such a homicide might be adjudged excusable if indeed the perpetrator was of an age at which he could be tried at all. Under seven years there is no liability; between seven and fourteen there is a rebuttable presumption of incapacity for entertaining a criminal intent.

² Il. xxiv. 595; cf. Brehier *De Graecorum Judiciorum Origine* 38 ff.

³ Lord Campbell's act of 1846 enabled the wife, husband, parent, and child to collect the actual damages suffered by the death of one who was killed by somebody's "wrongful act, neglect, or default." Similar statutes in this country have added a *solatium* to the actual damages. But the principle has nowhere been extended so as to include homicides of every kind.

⁴ Od. i. 35 ff.

⁵ Od. viii. 266 ff.

Accordingly Proetus took steps to encompass his death by guile after banishing him.¹ Amyntor punished his son Phoenix for debauching his concubine by cursing and banishing him.² One of the explicit charges which Odysseus made against the suitors before he proceeded to slay them was, *δμῶησιν δὲ γυναῖξι παρηνάζεσθε βιαίως*. This amounts to rape if indeed *βιαίως* is to be taken literally.³ But in view of the fact that these women are afterward punished for unchastity we must not look for the precision of an Athenian indictment in Odysseus' charge. The conduct of both suitors and servants was an intolerable insult to the master and called for redress.⁴

Robbery in the form of cattle-lifting and piracy was extremely common. Against piracy the individual, even when aided by his friends, had but slight means of protection. Both piracy and cattle-lifting on a large scale were matters for the community as a whole to redress. Against ordinary stealing a man had some chance of protecting himself. If under cover of mist or darkness his sheepfolds or herds were raided he might trace the lost animals and seek to recover them.⁵ But the mere finding of stolen animals would not suffice if the robber who operated by stealth was prepared to resort to force. Iphitus lost his life in trying to recover some stolen horses from Heracles.⁶ But the vigilant owner might surprise the thief in the act; and men were not infrequently wounded in protecting their cattle and sheep.⁷

Assault and battery arising out of disputes of various kinds must have been of common occurrence among men who habitually carried arms. For example, a quarrel about boundary stones such as is described in a simile of the *Iliad* might easily lead to a personal encounter.⁸ Threats of violence no doubt often caused men to refrain from insisting on their rights.⁹

Lipsius points out that the redress sought by an injured person included not merely the restitution of property destroyed, stolen,

¹ *Il.* vi. 160 ff.

² *Il.* ix. 454 ff.

³ *Od.* xxii. 37.

⁴ *Od.* xxii. 418.

⁵ *Il.* iii. 20 f. Autolycus, the maternal grandfather of Odysseus, was a skilful thief (*Od.* xix. 396).

⁶ *Od.* xxi. 22 ff.

⁷ *Od.* xvii. 471 ff.

⁸ *Il.* xii. 421 ff.; cf. the fight between Irus and Odysseus (*Od.* xviii. 1 ff.).

⁹ Laomedon is said by threats of violence to have defrauded Apollo and Poseidon of their wages (*Il.* xxi. 435 ff.).

or withheld, but also substantial damages.¹ The suitors offer to make terms on this basis; and the Trojans agreed to return Helen and her treasures together with suitable damages if Menelaus slew Paris in the duel.² When Agamemnon proposes to return Briseis to Achilles he offers a handsome gift. To these examples cited by Lipsius may be added the offer of Antilochus³ to pay reasonable damages as well as to restore the prize he wrongfully won from Menelaus in the chariot race. When the suitors propose that Telemachus send his mother back to her father he refuses to dismiss her against her will partly because her dowry will have to be restored together with a substantial sum in the way of damages. It is true that the words *κακὸν δέ με πόλλ' ἀποτίνειν* 'Ἰκαρίῳ may refer to the restitution of the dowry only; but the next line, *ἐκ γὰρ τοῦ πατρὸς κακὰ πείσομαι*, shows that more than mere restitution is contemplated.⁴ In effect the wager in the trial scene and the *μοιχάγρια* in cases of adultery amount to damages.⁵

The curses which injured persons called down on the heads of those who wronged them may in some cases have acted as a deterrent. Amyntor's curse on his son who debauched his concubine was fulfilled; and Telemachus refused to drive his mother from the palace partly through fear of her curses.⁶

When an outrage was committed by a stranger the injured person might himself seek to recover stolen property by presenting a claim to the community to which the stranger belonged, as Mentor (Athena in disguise) proposed to do.⁷ But that such a

¹Lipsius *op. cit.* 9 ff.

²Cf. the version preserved by Herodotus (ii. 118) according to which an embassy under Menelaus demanded the return of Helen and the stolen property as well as τῶν ἀδικημάτων δίκας.

³*Il.* xxiii. 591 ff.

⁴*Od.* ii. 132 ff. Lipsius thinks the dowry alone is in question. But the words πόλλ' ἀποτίνειν suggest a penalty. See *Il.* ix. 634, where they are used of paying blood-money.

⁵Such damages are variously described as *ποινή*, *ἀποίνα*, and *τιμή*. Fanta (*Der Staat in der "Ilias" und "Odyssee"* 84) wrongly regards *πείραρ* as referring to the wager (*Il.* xviii. 501).

⁶*Il.* ix. 453 ff.; *Od.* ii. 135 ff.; cf. *Il.* ix. 566 ff.

⁷ἀτὰρ ἦώθεν μετὰ Κεύκωνας μεγαθύμους
εἰμ', ἔνθα χρεῖδς μοι δφέλλεται, οὐ τι νέον γε,
οὐδ' ὀλίγον·

—*Od.* iii. 366-67.

The use of this excuse by Athena shows that these claims were not uncommon.

course involved considerable risk is clear from the fate of Iphitus, who was slain by Heracles while seeking to recover some stolen horses. As a rule the whole community took up these claims and took steps to obtain compensation. Thus Odysseus when a mere lad was sent by his father and the council of elders to Messenia to obtain redress for the theft of a number of sheep by Messenians.¹ The attitude of a community toward a marauder who thus exposed them to claims for damages is well illustrated by the measures taken by the Ithacans to punish Eupheithes who, by joining in a Taphian raid against a friendly people, had rendered the Ithacans liable to claims for redress. It was only the intervention of Odysseus that saved him from death and confiscation of property.² Failing redress by peaceful means the injured people usually resorted to reprisals. The accruing booty was divided among those who had suffered loss of property by the elders acting as a court of claims.³ Such a claim was called *χρεῖος*.

It is obvious that communities possessing any sort of organization must make some provision for the amicable settlement of disputes between citizens. The possession of *ἀγοραὶ βουλευφόροι* and *θέμιστες* distinguishes the civilized communities from the barbarous peoples of the Homeric age just as *δίκη* and *νόμος* marked the same distinction in later times.⁴ But modern investigators are by no means agreed as to the kind of provision that was made for the administration of justice. Three different views have been advanced: (1) The parties chose arbitrators who had no power to enforce their awards. (2) The judges were chosen from among the *γέροντες* and like modern judges had the power of enforcing their decisions. (3) The judges were really magistrates and represented the king.⁵ Unquestionably the administration of

¹ *Od.* xxi. 16 ff.

² *Od.* xvi. 420 ff. This incident will receive fuller treatment in the discussion of the judicial power of the people.

³ *Il.* xi. 685 ff. Cf. Lécivain "Le droit de se faire justice soi-même et les représailles," *Mémoires de L'Académie des Sciences de Toulouse* (1897) 277. Lécivain and the writers whom he quotes dismiss the Homeric period with a mere reference to the mission of Odysseus and the raid of Nestor.

⁴ *Od.* ix. 112; Herod. iv. 106.

⁵ These views are conveniently summarized by Thonissen *Le Droit Pénal de la République Athénienne* 23. Finsler, *Das Homerische Königtum* 320-21, 329, denies that a king ever acted as judge.

justice began with arbitration. Naturally the disputants would seek to obtain the services of a person who had a reputation for impartiality and wisdom without regard to rank or official position. We even hear of a woman, Arete, queen of the Phaeacians, who acted as an arbitrator.¹ But the prestige of the king must have marked him as the natural arbitrator. And it is the arbitral function of the Homeric kings that Aristotle² has in mind when he says τὰς δίκας ἔκρινον. Homer, it is true, nowhere pictures a king dispensing justice. But this is a mere accident, for Idomeneus proposed to Ajax to submit their dispute to Agamemnon.³ And Minos settling disputes in the spirit land certainly had his prototype in such kings as Nestor who περὶ οἷδε δίκας and Sarpedon who Λυκίην εἵρυτο δίκησίν τε καὶ σθένει ῥῶ.⁴ Everywhere in ancient times kings and tyrants exercised judicial functions.⁵ Deioces of Persia and Pisistratus⁶ of Athens administered justice as arbitrators. Accordingly we are justified in assuming that the Homeric ruler, whether a Zeus-nourished king or the official head of an aristocratic government, was constantly called upon to act as arbitrator. From a royal arbitrator to a court of γέροντες is not a far cry. In the earliest portion of the *Iliad* the chiefs are called δικασπόλοι, and in the *Odyssey* δικασπóλος ἀνὴρ is a synonym for nobleman.⁷ Clearly it was an established practice to refer disputes to the lesser chiefs acting either individually⁸ or in a body as they appear in the trial scene. An ambitious aristocracy would not fail to recognize the advantages that would accrue to themselves from the establishment of a regular court of arbitration to which disputants might refer their differences. In the Greek camp before Troy there was a place in or adjoining the ἀγορά which was set apart for the administration of justice,⁹ and was provided with seats for the judges. The appearance of a trial scene on the

¹ *Od.* vii. 74.

² *Politics* 1285b.

³ *Il.* xxiii. 485.

⁴ *Od.* iii. 244; *Il.* xvi. 542.

⁵ Among the Lydians, Persians, Egyptians, and Hebrews, Herod. i. 14, 96-97, 100; ii. 129; II Sam. 15:2.

⁶ Arist. *Const. of Ath.* xvi. 5; cf. Stesagoras of the Chersonese, Herod. vi. 38.

⁷ *Il.* i. 237 ff.; *Od.* xi. 184 ff.

⁸ For an individual arbitrator see *Od.* xii. 439-40.

⁹ *Il.* xi. 807; xviii. 497, 504.

shield of Achilles as a typical incident of public life and two similes drawn from judicial activities point to some sort of judicial organization. Court sessions were probably held with some degree of regularity and might last all day.¹ There is no indication that recourse to these courts was obligatory. Doubtless the tendency of public opinion was to support the man who was willing to arbitrate his differences with a fellow-citizen. The interests of the aristocracy would be materially advanced by fostering such a tendency. By the time of Hesiod the processes of arbitration had practically become compulsory.²

In the Homeric age the usual method of bringing a dispute to arbitration was by challenge and wager. When Idomeneus and Ajax had a dispute regarding the identity of the leader in the chariot race the Cretan leader said, "Come then, let us wager a tripod or a caldron and make Agamemnon, Atreus' son, our umpire, which mares are leading."³ And when Eumaeus the swineherd refused to believe the disguised Odysseus when he asserted that his master would return, Odysseus offered to stake his life against a suit of clothes that he spoke the truth. The parties to a challenge entered into a solemn agreement confirmed by oath to abide by the decision.⁴ The famous trial scene on the shield of Achilles is another instance of arbitration on challenge and wager. Like all the scenes represented on the shield this really combines a series of pictures.⁵ That is to say, several pictures would be required to illustrate the poet's description. Without discussing at this point the various interpretations that have been offered, I shall present the explanation that seems to me to be the most plausible. The text is given for convenience of reference:⁶

497 λαοὶ δ' εἰν ἀγορῇ ἔσαν ἀθρώοι· ἔνθα δὲ νείκος
ὠρώρει, δύο δ' ἄνδρες ἐνείκεον εἵνεκα ποινῆς
ἀνδρὸς ἀποφθιμένου· ὁ μὲν εὐχετο πάντ' ἀποδοῦναι

¹ *Il.* xvi. 387-88; *Od.* xii. 439.

² Hesiod *Works and Days* 35 ff.; cf. Gilbert *op. cit.* 461.

³ *Il.* xxiii. 485; Lang, Leaf and Myers' translation.

⁴ *Od.* xiv. 391 ff.; cf. *ibid.* xvi. 102-3.

⁵ Dareste *Annuaire des Études Grecques* XVIII, 91.

⁶ *Il.* xviii. 497-508.

- 500 δῆμῳ πιφαύσκων, ὃ δ' ἀναίνετο μηδὲν ἐλέσθαι·
 ἄμφω δ' ἰέσθην ἐπὶ ἱστορί πεῖραρ ἐλέσθαι.
 λαοὶ δ' ἀμφοτέρουσιν ἐπήπυνον, ἀμφὶς ἄρωγοί·
 κήρυκες δ' ἄρα λαὸν ἐρήτυνον· οἱ δὲ γέροντες
 ἦατ' ἐπὶ ξεστοῖσι λίθοις ἱερῷ ἐνὶ κύκλῳ,
 505 σκῆπτρα δὲ κηρύκων ἐν χέρσ' ἔχον ἡεροφώνων·
 τοῖσιν ἔπειτ' ἤισσον, ἀμοιβηδὺς δὲ δίκασον.
 κέλετο δ' ἄρ' ἐν μέσσοισι δύνω χρυσοῖο τάλαντα,
 508 τῷ δόμεν, ὃς μετὰ τοῖσι δίκην ἰθύντατα εἴποι.

A man had been killed some time before the trial, and his kinsmen and friends rallied to take vengeance on the slayer, whose friends also supported him in large numbers. Finally the bulk of the community was ranged on one side or the other.¹ A compromise seemed advisable, and an agreement to settle the blood-feud for a sum of money was reached. The scene on the shield presents the principals disputing about the payment. The one claims that he has paid the money in full; the other denies it. In the market place each man, surrounded by his partisans who had sided with him in the earlier stages of the feud, tells his side of the case to those within hearing. At length one challenges the other to stake a talent apiece and refer the dispute to arbitration. An agreement to abide by the verdict is made and confirmed by oaths.² The talents constituting the wager are deposited before the elders seated in the place of justice, each with a scepter, the emblem of the judicial office. Around them surge the partisans so closely that the heralds are obliged to restrain them. The litigants then present their cases amid the applause of their partisans. In succession the elders express their views; the majority determined the verdict. The two talents were awarded to the winner of the suit.

A more detailed discussion of the difficulties with which these lines fairly bristle will serve to make clear the basis of this interpretation. Many scholars have maintained that the deep popular interest can be accounted for only by assuming that the homicide is an issue. My theory that the present dispute is connected with an earlier feud will account for the interest in a case involv-

¹This I infer from the deep interest which the people take in the trial.

²For an agreement (ῥήτρην) of this kind see *Od.* xiv. 393 ff.

ing a mere debt. Those who regard the homicide as the issue interpret ὁ μὲν εὔχετο πάντ' ἀποδοῦναι to mean "the one promised to pay all," and ὁ δ' ἀναίμετο μηδὲν ἐλέσθαι to mean "the other refused to accept anything."¹ It may be admitted that linguistically this translation is possible, though Lipsius² argues convincingly against it. It is assumed that the arbitration is to determine whether the relative shall be obliged to accept blood-money. A minor difficulty lies in the word πάντα (499). How could a man who insisted on his right to pay a blood-price because the homicide was, let us say, ἀκούσιος be said to promise to pay *all*? But there is a more serious difficulty. There is nothing to show that relatives could be forced to accept blood-money; neither is there any evidence of a growing popular sentiment in favor of a settlement.³ Quite the contrary is the case. Banishment, as we have seen, is the usual fate of the slayer. Moreover the acceptance of blood-money is cited as an example of extreme self-restraint.⁴ But it by no means follows that the passion of the man is restrained if he accepted blood-money under compulsion; his heart might still be seething with anger and a desire for revenge. Surely the poet is thinking of a man who acted of his own free will. Leist⁵ assumes that when the homicide was ἀκούσιος the relatives were obliged to accept money. Unfortunately for this theory, in the only instance of φόνος ἀκούσιος the slayer, Patroclus, a mere youth, was banished.⁶ So far as the evidence of the poems

¹ Leaf *Journal of Hellenic Studies* VIII (1887), 122 ff.

² Dareste, *Nouvelles Études* 6, is unconvinced by the criticisms of the view of Leaf by Lipsius in *Leipziger Studien* (1890) 228 ff.

³ In view of the killing of Aegistheus I do not understand how Leaf can say, "There is, I believe, no case in the poems where blood is ever exacted for blood."

⁴ *Il.* ix. 632-37:

καὶ μὲν τίς τε κασιγνήτοιο φονῆος
ποινὴν ἢ οὐ παιδὸς ἐδέξατο τεθνηῶτος·
καὶ ῥ' ὁ μὲν ἐν δῆμῳ μένει αὐτοῦ πόλλ' ἀποτείσας,
τοῦ δέ τ' ἐρητύεται κραδίη καὶ θυμὸς ἀγῆνωρ
ποινὴν δεξαμένη. σοὶ δ' ἄλληκτόν τε κακὸν τε
θυμὸν ἐνὶ στήθεσσι θεοὶ θέσαν εἵνεκα κούρης
οὔης.

Leaf cites this passage to prove that the payment of a fine instead of exile was the recognized course.

⁵ *Gräco-italische Rechtsgeschichte* 330 ff.

⁶ This case has already been discussed in some detail.

goes the distinction between *φόνος ἀκούσιος* and *φόνος ἐκούσιος* played no part in determining the fate of the slayer, neither is it a necessary assumption to explain the trial scene. Various rôles have been assigned to the people. Gilbert suggests that they are compurgators (*Eideshelfer*);¹ others believe that they decided to which of the elders the prize of two talents went. The *ἵστωρ* has been variously identified as a witness, as the king, as the chairman of the *γέροντες*. The scholiast regards the *ἵστωρ* as a witness; but this view is now regarded as incorrect. An objection urged by Dareste² is fatal. If the case was to be decided by the testimony of a witness, what need was there of pleas by the parties or of discussions by the elders? Dareste's³ former view that *ἐπὶ ἵστορι* merely means "by arbitration" is the most satisfactory. There is no evidence that either a king or an elder acting as an arbitrator selected by the parties ever referred the case to the council of elders. If it was customary for the king to ask the aid of the elders in arbitrations why did not Idomeneus instead of naming Agamemnon as the proposed arbitrator in the dispute between himself and Ajax offer to submit the matter to the *Ἀργείων ἡγήτορες ἡδὲ μέδοντες* as did Menelaus in his dispute with Antilochus?⁴ Neither is there any mention of a presiding officer of the council of elders in this connection.⁵

The former view⁶ that l. 506 refers to the litigants has been generally abandoned, though much may be said in its favor. But

¹ Gilbert *op. cit.* 469, n. 1.

² *Annuaire des Études Grecques* (1884) 94 ff.

³ *Op. cit.* 95. "L' *ἵστωρ* et les *γέροντες* sont une seule et même chose." (So also Lipsius *Leipz. Stud.* [1890] 231.) His later view in *Nouvelles Études D'histoire du Droit* (1902) 11, is that the *ἵστωρ* is the sole judge and that the elders are assessors.

⁴ *Il.* xxiii. 485, 573.

⁵ After the Pylians had made a successful raid on the Eleans, the king selected a portion of the plunder to recoup losses he had suffered at the hands of the Elean raiders. The elders acting as a court of claims divided the remainder amongst those who had lost property. If the king acted in this case he is not distinguished from the nobles (*Il.* xi. 670 ff.).

⁶ Doederlein translates *δίκαν* by *causam suam agebant*, and Heyne by *alter post alterum causam egerunt*. It is evident that *ἡσσαν* suits the eager litigants better than the judicial elders. But the stumbling-block is *δίκαν*. It is said that *δικάζω* in the active is never used of a litigant. To maintain this rule we are obliged to regard Menelaus both as plaintiff and judge in the same case (*Il.* xxiii. 570). This case is discussed later. There is a distinct change of scene. The poet is now describing the

so far as the legal interpretation is concerned it is of no consequence. Of vital importance, however, is the interpretation of l. 508. According to the most widespread view it refers to the judges. This interpretation introduces an unparalleled feature into the trial. It is not strictly a counterpart of the Roman practice of giving a reward to the judge in the *Legis actio sacramenti*, for here the reward goes to only one of many judges.

Sir Henry Maine believes that the two talents were for the judge "who shall explain the grounds of his decision most to the satisfaction of the audience."¹ Beyond this point it is impossible to follow the proceedings. It would seem necessary to confine the contest for the prize to those of the judges whose opinion agreed with the verdict; otherwise the people might reach a conclusion at variance with that of the council. For we may be sure that the merits of the case would play a large part in the popular decision. Such a result would assuredly defeat the purpose of the arbitration. On the other hand, if the prize must be assigned to one of the majority judges, what is the basis of the decision? In a case involving a question of fact (i.e., was the money paid as alleged?) there could be but little difference between the affirmative opinions in point of merit. Laurence has emphasized this feature of the theory in a vein of mild and well-deserved satire.² It is to avoid this highly improbable situation that Leist, Leaf, and other followers of Maine have without sufficient warrant assumed that the homicide is itself in issue. This would allow some considerable variety of reasons for reaching the same conclusion, but it involves a difficulty quite as serious, for everything in the poems points to the fact that the relatives always decided whether they would accept the blood-price or not.

But the line is capable of quite another rendering. Lipsius has shown that in accordance with Homeric usage *δίκην εἰπεῖν* may be rendered "plead a cause." He cites *Ἀχιλλῆα δίκην ἡμείψατο*, "answered Achilles with a claim of right," and *δίκας εἶροντο* proceedings in court. And it is certainly surprising that the only line which deals with the proceedings should be devoted to the process by which a decision is reached which is of little interest in comparison with the pleas of the parties.

¹ *Ancient Law* 364.

² "Judges and Litigants," *Journal of Philology* VIII (1879), 125 ff.

ἀνακτα, "they were asking the king concerning their rights." To these may be added *ἐπὶ ῥηθέντι δικάϊω*, "a (fair) claim of right."¹ From the linguistic standpoint there is perhaps but little to choose between the two renderings; but Lipsius finds in *μετὰ τοῖσι* a decisive argument: "Die Bedeutung der Präposition aber lässt nur die Wiedergabe mit 'vor, bei' zu und verbietet die Gleichsetzung mit einem Genetive." *Μετὰ τοῖσι* simply means "in court." The two talents, then, must go to the man in whose favor the verdict was given.

Two views regarding the source and significance of the two talents are prevalent. Lipsius, who regards them as the blood-price paid into court by the slayer, admits that two talents is a small sum for the price of a slain man. In the only other case where blood-money is mentioned the amount is said to have been large: "Yet doth a man accept recompense of his brother's murderer or for his dead son; and so the slayer for a great price abideth in his own land." It is pointed out that the close relationship, that of brother or son, accounts for the largeness of the sum. But even if we accept the assumption that in the trial scene the slain man is a distant relative of the plaintiff, the sum is still too small. Two talents are the fourth prize in a chariot race in which the first is a tripod and a woman and the third a caldron. Is not a freeman of more value than a slave woman, and that too not of the best, as may be seen by a comparison with the women offered by Agamemnon to Achilles?² Indeed, a woman or a tripod is the usual prize in a chariot race;³ and a tripod or a caldron is an ordinary wager in a trivial dispute between Ajax and Idomeneus.⁴ Was the life of a man held so lightly by even a distant relative? Surely lifelong banishment could not be com-

¹ *Od.* xi. 570; *Il.* xxiii. 542; *Od.* xviii. 414; xx. 322.

² *Il.* xxiii. 262-70. These women not only were skilled in handiwork (*ἔργα ἰδυίας*), but possessed personal charms (*αἱ κάλλει ἐνίκων φῦλα γυναικῶν*, *Il.* ix. 130).

³ *Il.* xxii. 164. This phase of the question is treated by Ridgeway, *Journal of Philology* X, 30 ff. In a later paper (*Journal of Hellenic Studies* VIII, 133) he discusses the value of the Homeric talent and shows that it is not too large a sum for a reward to the best judge. He finds that the talent is equal in value to an ox. The results of these investigations tend to confirm the objection that two talents are quite insufficient for the blood-price.

⁴ *Il.* xxiii. 485.

muted for so small a sum. As a wager a talent is not excessive. The tripod or the caldron which are mentioned in the proposed wager between Ajax and Idomeneus might cost more than two talents apiece, as may be inferred from the prize list in the chariot race.

The wager has been compared with the *poena sponsionis et restipulationis* of Roman law which went to the successful litigant. In Attic law it survives in a modified form in the παρακαταβολή deposited by the plaintiff and forfeited in case of failure either to the state or to the defendant according to the nature of the case.¹ In effect the wager corresponds to the damages which according to Homeric practice usually accompanied restitution and redress.

But the strongest argument in favor of the wager theory is the general Homeric custom of bringing a dispute to an issue by means of a wager. There are traces of challenge to battle as a means of settling disputes which is in effect a wager. After the chariot race Achilles proposed to give to Eumelus the second prize, because owing to an accident he had lost his leading position and was compelled to drop out. But Antilochus protested and claimed the mare because he was second in the race:

τὴν δ' ἐγὼ οὐ δώσω· περὶ δ' αὐτῆς πειρηθήτω
ἀνδρῶν ὅς κ' ἐθέλῃσιν ἐμοὶ χεῖρεσσι μάχεσθαι.²

Achilles yielded and gave Antilochus the mare. The award was at once protested by Menelaus on the ground that Antilochus had won by a foul, and the dispute was finally settled by a challenge to Antilochus to take an evidentiary oath, which is also a species of wager. At first Menelaus called upon the chiefs to arbitrate between himself and Antilochus without favor (μηδ' ἐπ' ἄρωγῇ).³ The method of arbitration here suggested is no doubt the same as in the trial scene. As Menelaus immediately rejects his own suggestion in favor of a challenge to take an evidentiary oath which first occurred to him when he was fouled, no details are given. Trial by evidentiary oath consists in tendering to an opponent an oath embodying his contentions or in offering to take an oath

¹ Meier and Schoemann *Der attische Process*² 815 ff.

² *Il.* xxiii. 553-54; cf. Bréhier *De Graecorum Judiciorum Origine* 96.

³ *Il.* xxiii. 574 ff.

embodying one's own contentions.¹ Here Menelaus challenges Antilochus to swear that he did not win by a foul. The oath is refused and the prize goes to Menelaus. Had Antilochus cared to take the oath at the risk of being *δαίμοσιν ἀλιτρός*, he would have been entitled to the prize according to the terms of the challenge. This is implied in Menelaus' saying during the race, οὐδ' ὥς ἄτερ ὄρκου οἴσῃ ἄεθλον. No money wager is required in this kind of trial, but Antilochus expresses his willingness to pay the usual damages. This offer is, of course, quite gratuitous. But it serves to show how firmly fixed was the custom of demanding damages along with the restitution of an article wrongfully taken. Menelaus' words, εἰ δ' ἄγ' ἐγὼν αὐτὸς δικάσω, are commonly taken to mean that he proposes to act as judge and that, too, in his own case.² Now Menelaus had rejected his own proposition to submit the dispute to the arbitration of the chiefs lest people should criticize him and say, "Menelaus by constraining Antilochus with false words has gone off with the prize." Trial by evidentiary oath was preferred expressly because the result would be just (*ἰθεία*), and there would be no chance for a decision ἐπ' ἀρωγῇ. Under these circumstances no one, I fancy, would be more surprised than Menelaus himself to find that his words are interpreted to mean that he was judge in his own case. He would, doubtless, have readily agreed with Plato³ that the gods and not men are the judges in this kind of trial. The confusion arises from pressing the meaning of δικάσω too closely, owing to a desire to preserve a distinction between the active and middle voices. Menelaus simply means to say, "I'll make my right in the matter clear." As a matter of fact the chiefs who are asked to criticize his proposal are the only persons who can be regarded as judges. This is the only instance of a case decided by an evidentiary oath.

There is no instance of an oath rendered by a disputant in support of his own contentions; but it was perhaps not uncommon in practice. Hermes in the Homeric⁴ hymn offered to swear that he had not stolen the cattle. And Autolycus, the maternal grandfather of Odysseus, who is said to have excelled all men in stealing

¹ Plato discusses the evidentiary oath, *Laws* 948B.

² Gilbert *op cit.* 464.

³ *Laws* 948B.

⁴ *Hymn to Hermes* 324.

and swearing, was apparently able to escape responsibility when charged with theft by swearing that he was not guilty.¹

Witnesses are nowhere mentioned in Homer in connection with arbitrations. The gods in whose names oaths were sworn are called *μάρτυροι* or *ἐπιμάρτυροι*. They are not only witnesses but sureties or guarantors of the compact or treaty, because they punish perjurers.² For the person in whose interest they act they are protectors. Zeus is called the *μάρτυρος* of strangers, because when called upon to witness a wrong done to the stranger he punishes the wrongdoer.³ Here we have the origin of human witnesses and sureties. In place of gods, men are summoned to the making of a contract to insure its provisions being carried out. But this stage was not reached in the age of Homer.⁴ Occasionally the word *μάρτυρος* is used of those who are familiar with some event or situation;⁵ but they are not summoned either as formal or as general witnesses. The word *μαρτυρή* in the *Odyssey* is not used in a technical sense.⁶

Some scholars regard the omission of testimonial evidence as purely accidental.⁷ The earliest mention of witnesses occurs in Hesiod.⁸ But this affords no ground for inferences regarding the Homeric age. For the judicial system that prevailed in the time of Hesiod is considerably more advanced than that of the age of Homer, as is shown by the development of compulsory legal processes. The Homeric arbitrator had to rely upon what Gilbert aptly calls his "eigene Combination" (resourcefulness), or the voluntary evidentiary oath of one of the parties.

Crimes and criminals⁹ are unknown to Homer. The conception of crime as a wrong which was a menace to society was not yet

¹ *Od.* xix. 396; cf. *Il.* x. 267; Ovid *Met.* xi. 312.

² *Il.* iii. 274 ff.; vii. 76; cf. Nagelsbach *Homericæ Theologie* 265. ³ *Od.* xvi. 423.

⁴ In the "Song of Demodocus" (*Od.* viii. 266 ff.) Poseidon offered to be surety for Ares. This passage is of late origin but preserves a link in the process of development.

⁵ *Il.* i. 338; ii. 302.

⁶ *πάρος δέ μιν (Ariadne) Ἀρεμὶς ἔκτα*
Διὶ ἐν ἀμφιρύνῃ Διονύσου μαρτυρήσει.

—*Od.* xi. 325.

⁷ Gilbert *op. cit.* 467; Buchholz *Homericæ Realien* 87.

⁸ *Works and Days* 282, 371.

⁹ Levi (*Delitto e Pena nel Pensiero dei Greci* 38) finds one exception: "Un solo tipo di degenerato, come direbbesi ora, ricorda l'*Iliade*: Tersite."

formulated, though it is dimly foreshadowed in the feeling of abhorrence for the fomentor of civil strife so well voiced by Nestor:¹

ἀφρήτωρ ἀθέμιστος ἀνέστιός ἐστιν ἐκείνος
ὃς πολέμου ἔραται ἐπιδημίου δκρυνέοντος.

Every community, however, was more or less familiar with wrongdoers whose deeds affected the whole community alike. A common example of this class of offender is the man who by committing depredations upon a neighboring people involves his fellow-citizens in responsibility. Neither the king nor the council ever undertook to deal with offenses of this class. They were punished, if at all, by the people. Even in a Homeric community public opinion was quickly crystallized² and easily translated into action through the medium of the popular assembly. According to the prevailing view such action is mere mob violence.³ But, however much apparent justification this view may have in the differences between the orderliness and precision of modern legal machinery, and the rough-and-ready methods of a primitive people, it is based upon a misconception. The term mob violence is properly applied only to the acts of people who usurp the functions of the regular courts. In the absence of any provision for the punishment of public offenders,⁴ the people were obliged to take measures for their own protection. If they met together and acted after due deliberation they constituted a popular court quite as much as the Athenian assembly that tried Miltiades.⁵ The essential difference between the assembly of the "Ten Thousand" which tried Xenophon for aggravated assault and the mob of soldiers that attacked the market clerks is that in the former case

¹ *Il.* ix. 63 ff.

² There was practically no restriction upon freedom of speech. Jebb ("Ancient Organs of Public Opinion," *Essays and Addresses* 139 ff.) points out how the poet keeps us informed of the trend of public opinion by constantly quoting remarks or conversations that sum up the sentiments of a crowd.

³ Cf. Lipsius *Das attische Recht* 6; Gilbert *op. cit.* 447. Finsler ("Das Homerische Königtum," *Neue Jahrb. f. Phil.* XVII, 321 ff.) recognizes fully the judicial power of the people, but treats it only incidentally: "Eine richterliche Gewalt hat, wie ebenfalls schon erwähnt worden, der Demos, wenn er den Eupheithes an Leib und Gut straffen will, oder die Frier Halitherses mit Busse und Mentor mit Vernichtung bedrohen."

⁴ The king in his capacity of general might punish breaches of discipline; cf. *Il.* xii. 248.

⁵ Herod. vi. 186. This is the first trial before the assembly of which we have any account (Lipsius *Das attische Recht* 180).

they acquainted themselves with the facts, while in the latter many of the participants were entirely ignorant of the cause of the attack.¹

Definite information regarding the right to summon meetings of the people for either deliberative or judicial purposes is lacking. It has been assumed that the right belonged to the king alone; but no one questioned the authority of Telemachus to call a meeting to deal with the suitors.² And yet we may be sure that this point would have been raised by the suitors, who were anxious to prevent the intervention of the people, if the sole right to summon the assembly belonged to the king. At a later time Penelope proposed to have Laertes appeal to the people.³ And the suitors themselves after their attempt to waylay and kill Telemachus were in dread of another appeal to the people which might result in their banishment.⁴ Both Nestor and Odysseus were surprised that the people did not interfere to protect Penelope and Telemachus.⁵ Aegyptius, an adherent of the suitors, clearly intimates that anyone in distress might appeal to the people provided the matter was of public import.⁶ It was always the natural instinct of Greeks to resort to the place of assembly even without special summons when anything happened that concerned the whole community. Thus the Ithacans on hearing of the slaughter of the suitors assembled of their own accord in the ἀγορά.⁷ Moreau⁸ is unquestionably right

¹ Xen. *Anab.* v. 7. 19 ff.

² It is surprising to hear that this is the first meeting since the departure of Odysseus. Fanta (*Der Staat in der "Ilias" und "Odyssee"* 87) regards this as proof that the king regularly summoned the assembly. There is a strong temptation to regard the statement of Aegyptius as a rhetorical exaggeration. Moreau ("Assemblées Politiques chez Homère," *Revue des Études Grecques* VI [1893], 214) remarks: "Il est sans doute extraordinaire qu' Ithaque ait passé vingt ans sans agora, et, si j'osais, je dirais volontiers que je n'en crois rien." Finsler, *op. cit.* 321, sees in the meeting "die Wiederkehr geordneter Zustände." This seems to be correct. The interests of the suitors made it desirable that there should be no meetings; cf. *Od.* xvi. 361 ff.

³ *Od.* iv. 735 ff. There is no indication that Laertes had special authority during the absence of Odysseus, whose representative was Mentor (*Od.* ii. 225 ff.).

⁴ *Od.* xvi. 375 ff.

⁵ *Od.* iii. 214 ff.

⁶ νῦν δὲ τίς ὧδ' ἤγειρε; τίνα χρεῖω τόσον ἔκει
ἡὲ νέων ἀνδρῶν, ἡ οἱ προγενέστεροί εἰσιν; —*Od.* ii. 28 f.

⁷ αὐτοὶ δ' εἰς ἀγορὴν κλον ἄθροοι ἀχνύμενοι κῆρ. —*Od.* xxiv. 420.

⁸ *Op. cit.* 213. Finsler, *op. cit.* 327, believes that the right to summon the assembly belonged to the king or to any noble.

in saying "Il n'est pas téméraire d'admettre que le droit de convocation est un droit populaire ouvert à tous."

There was practically no difference between the procedure of a popular court and that of a deliberative assembly. A typical meeting of the people for judicial purposes is that summoned by Telemachus to deal with the suitors. Telemachus brings up what is apparently a private grievance; but as Halitherses hinted, it really concerned the whole people.¹ And the event proved that this was the case, for Odysseus demanded that they make good the material losses occasioned by the constant feasting of the suitors.² Three speakers presented the case against the suitors, and four addressed the assembly in their favor. Telemachus did not ask for the punishment of the suitors nor for the restitution of his property.³ At best he hoped to be able to induce or force them to leave the palace. ἀλλὰ πολὺ πρὶν φραζώμεσθ' ὥς κεν καταπαύσομεν· οἱ δὲ καὶ αὐτοὶ πανέσθων· says Halitherses, one of Telemachus' active supporters.⁴ But the threats of the suitors deterred the people from taking any active measures.

As a result of the slaughter of the suitors Odysseus was himself charged with offenses against the community. After disposing of the bodies of the slain suitors the people resorted to the ἀγορά. Eupheithes, the father of Antinous, was the first speaker. He began, not by asking aid in avenging the deaths of the suitors, but by asking for the punishment of Odysseus as a public offender: ὦ φίλοι, ἧ μέγα ἔργον ἀνὴρ ὅδε μήσατ' Ἀχαιοῦς.⁵ Speeches against the proposal of Eupheithes were made by partisans of Odysseus. Halitherses pointed out that the men richly deserved their fate, and Medon, the herald, a pardoned adherent of the suitors, expressed his conviction that the gods were on the side of Odysseus.⁶ Finally a majority decided to slay Odysseus. By a curious reversal of fortune Eupheithes now led the people against the man who years before had saved him from a similar predicament. As a member of a marauding band of Taphians he had raided the Thesprotians, an allied people. The Ithacans decided

¹ *Od.* ii. 45, 166 ff.

² *Od.* xxiii. 356.

³ He does, indeed, suggest restitution, but in a very guarded manner. Cf. *Od.* ii. 74.

⁴ *Od.* ii. 167.

⁵ *Od.* xxiv. 426.

⁶ *Od.* xxiv. 439 ff.

to put him to death and to confiscate his property, but he fled to the palace and his life was saved by the influence of Odysseus.¹ Our information about this case is meager. The people met in the absence of the king and reached a decision with which he was not in accord. But there is no hint that they exceeded their powers. The implication is, rather, that they yielded to the persuasions, and not the power, of Odysseus in allowing the guilty man to go free. Judging from the orderly procedure against Odysseus we may assume with some degree of confidence that this case was handled in much the same way. Paris, like Eupheithes, had by carrying off Helen exposed his people to reprisals on the part of the Greeks. Hector² has this situation in mind when he says:

ἀλλὰ μάλα Τρῶες δειδήμονες· ἧ τέ κεν ἦδη
 λάιον ἔσσο χιτῶνα κακῶν ἔνεχ' ὅσσα ἔοργας.

Stoning was the usual mode of executing the death penalty, and it may very well be that Hector was referring to contemplated judicial proceedings against Paris before a popular court. The suitors in threatening to fine Halitherses for aiding and abetting Telemachus contemplated the use of the judicial powers of the people for their own ends. No doubt they possessed sufficient ascendancy over the people to secure their acquiescence in the punishment of Halitherses, though the charge against him could not have appealed to any considerable number of them.³

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¹*Ibid.* xvi. 420 ff. As has been pointed out, it was the practice to hold the whole community responsible for cattle-lifting, even when only a few participated.

²*Il.* iii. 56f.

³ αἱ κεν νεώτερον ἄνδρα παλαιὰ τε πολλὰ τε εἰδῶς
 παρφάμενος ἐπέεσσιν ἐποτρύνῃς χαλεπαίνειν
 αὐτῷ μὲν οἱ πρῶτον ἀνηρέστερον ἔσται
 σοὶ δέ, γέρον, θωγὴν ἐπιθήσομεν.

—*Od.* ii. 188 ff.

Finsler (*op. cit.* 322) thinks that in the case of Mentor also judicial proceedings were contemplated (*Od.* xxii. 216 ff.).